U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

FILE: [redacted] Date: APR 28 2000

IN RE: Applicant: [redacted]

APPLICATION: [redacted]

IN BEHALF OF APPLICANT:

[redacted]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

For Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the District Director, Honolulu, Hawaii, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant was born on April 14, 1967 in Villaviciosa, Philippines. The applicant's father, [redacted] was born in the Philippines in 1939 and never claimed to be a U.S. citizen. The applicant's mother, [redacted], was born in 1942 in the Philippines and became a naturalized United States citizen in 1980. The record is devoid of evidence to show that the applicant's parents married each other. However, the applicant's mother and father were divorced on May 30, 1972. The applicant became the beneficiary of an approved immediate relative visa petition filed by his mother on May 8, 1980 and he was lawfully admitted for permanent residence on February 7, 1981. The applicant claims eligibility for a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432.

The district director determined the record failed to establish that the applicant failed to establish that he was in his mother's legal custody prior to his 18th birthday and denied the application accordingly.

Section 321(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
>
> (4) Such naturalization takes place while said child is under the age of 18 years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

In Matter of Fuentes-Martinez, Interim Decision 3316 (BIA 1997), the Board stated the following; "Through subsequent discussions,

[the interested agencies] have agreed on what we believe to be a more judicious interpretation of § 321(a). We now hold that, as long as all the conditions specified in § 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

The question to be resolved is whether the applicant was in the "legal custody" of his mother prior to his 18th birthday.

INTERP 320.1(a)(6) provides, in part, that generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody.

The applicant's mother obtained a divorce in 1972 in the State of Nevada from the applicant's natural and legal father who was a resident of the Philippines. The divorce decree recognizes the five minor children of [redacted], four of whom including the applicant were residing in the Philippines at that time, and a fifth child who was residing in the United States with the applicant's mother. The Second Judicial district Court of the State of Nevada only granted the applicant's mother custody of the child residing in the United States, as the State Court lacks jurisdiction over children residing in another country.

INTERP 320.1(a)(6) further provides that, in the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for derivative purposes, provided the required "legal separation" of the parents has taken place. See Matter of M-, 3 I&N Dec. 850 (C.O. 1950).

In Matter of M-, the female child was born in 1929 of alien parents and was lawfully admitted to the United States for permanent residence in August 1947 while under the age of 18 years. The child's parents had their marriage annulled in 1940 and the child remained abroad with her mother until 1947. The child's father came to the United States in 1941 and naturalized in 1946. The parent's annulment decree made no provisions for custody of the child. The Central Office concluded that the child had derived U.S. citizenship at the time she was lawfully admitted for permanent residence.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The record establishes that (1) the applicant's mother became a naturalized U.S. citizens prior to the applicant's 18th birthday, (2) the applicant became the beneficiary of an approved visa petition filed by his mother, and (3) he was residing in the United States with his mother as a lawful permanent resident prior to his 18th birthday.

[redacted]

The applicant has met this burden of establishing that he was in the "legal custody" of his mother prior to his 18th birthday. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The district director's decision is withdrawn, and the application is approved.